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Supreme Court of the United States

OCTOBER TERM, 1994

MEARS TRANSPORTATION GROUP, INC., CHECKER CAB COMPANY OF ORLANDO, INC., CITY CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., MEARS SPECIAL SERVICES, INC., AIRPORT LIMOUSINE SERVICE OF ORLANDO, INC., ASHTIN LEASING, INC., d/b/a ACE METRO CAB and GATOR CAB, and PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Petitioners,

v.

FRED O. DICKINSON, III, as Executive Director of the State of Florida Department of Highway Safety and Motor Vehicles,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Florida Session Law 92-29, which requires the owners and operators of taxicabs, limousines, jitneys, or other for-hire passenger transportation vehicles to purchase initial coverage of $30,000.00 per incident from an insurance carrier which is a member of the Florida Insurance Guaranty Association, is preempted by the Liability Risk Retention Act of 1986, 15 U.S.C. § 3901 *et seq.?*

LIST OF PARTIES PURSUANT TO RULE 29.1

Ace Metro Cab of Orlando, Florida

Airport Limousine Service of Orlando, Inc.

Ashtin Leasing, Inc.

Checker Cab Company of Orlando, Inc.

City Cab Company of Orlando, Inc.

Fred O. Dickinson, III
State of Florida Department of Highway Safety and Motor Vehicles

Gator Cab Co. of Orlando, Florida

Mears Special Services, Inc.

Mears Transportation Group, Inc.

Paratransit Risk Retention Group of Maryland, Inc.

Property General, Inc.

State of Florida Department of Highway Safety and Motor Vehicles

Yellow Cab Company of Orlando, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Mears Transportation Group, Inc., Checker Cab Company of Orlando, Inc., City Cab Company of Orlando, Inc,. Yellow Cab Company of Orlando, Inc., Mears Special Services, Inc., Airport Limousine Service of Orlando, Inc., Ashtin Leasing, Inc., d/b/a Ace Metro Cab and Gator Cab, and Paratransit Risk Retention Group of Maryland, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. A, 1a-25a) is reported at 34 F.3d 1013. The opinion of the United States District Court for the Middle District of Florida in *Mears Transportation Group, Inc. v. Dickinson* (App. B, 26a-34a) is published as an appendix to the dissent to the opinion of the court of appeals, but it is not separately reported. The Order of the court in *Ashtin Leasing, Inc. v. Dickinson* (App. F, 40a-41a) is not reported.

JURISDICTION

The court of appeals entered its judgment on October 11, 1994. Petitioners timely moved for rehearing. Rehearing was denied on December 20, 1994. (App. G, 42a-43a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal Liability Risk Retention Act, 15 U.S.C. §§ 3901-06 ("LRRA"), establishes the specific authority for risk retention groups chartered in one state to operate in other states, reserves specific but limited regulatory power to non-charter states and exempts such groups from any other direct or indirect regulation or invidious discrimination by the non-charter states. Sections 3902 and 3905, which are primarily at issue here, are set forth in their entirety in Appendix H (49a-54a).

Florida Session Law 92-29, 1992 Laws of Florida ch. 92-29 ("Session Law 92-29") (codified at section 324.031, Florida Statutes (Supp. 1992) (the "Florida Financial Responsibility Statute")) requires that owners and operators of taxicabs, limousines, jitneys, or any other for-hire passenger transportation vehicles must prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy. The policy *must be* issued by a member of the Florida Insurance Guaranty

Association. Session Law 92-29 is set forth in its entirety in Appendix H (44a-46a).

STATEMENT

A. Facts

Risk retention groups provide efficient and economically advantageous liability coverage to businesses with similar risk exposure. These benefits are available to group members because the group is able to 1) institute aggressive risk-minimization requirements, including industry-specific safety programs and training procedures, and 2) establish rates based on the similar loss experience of the limited group.

Congress officially recognized the wisdom and utility of risk retention groups when it enacted the Product Liability Risk Retention Act of 1981, Pub. L. 97-45, 1981 U.S.C.C.A.N. (95 Stat.) 949 (the "PLRRA"), in response to a crisis in the availability of insurance covering product liability or completed-operation claims. In 1986, Congress amended and expanded the PLRRA (thereby creating the LRRA) to include coverage of other business liability exposures in recognition of the success and benefit of risk retention. In order to foster the establishment and development of such groups, Congress expressly exempted risk retention groups from state regulatory requirements (other than those of the state in which the group was initially chartered) which would have the effect of inhibiting the operation of risk retention groups within the individual states. 15 U.S.C. § 3902(a). Among the express prohibitions is any state law or regulation which would "require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong." 15 U.S.C. § 3902(a)(2).

While the 1986 amendments recognized the ability of a state to specify acceptable means of demonstrating financial responsibility as a condition for issuance of a license

or permit to undertake specified activities, 15 U.S.C. § 3905(d), that ability is expressly subject to the anti-discrimination provision of section 3902(a)(4).

Before 1992, Florida's Financial Responsibility Statute permitted any vehicle owner or operator who was not a natural person to show financial responsibility by posting a bond of $25,000.00 per vehicle, to a maximum of $100,000.00, and by maintaining excess insurance providing combined coverage limits of $100,000.00. § 324.031, Fla. Stat. (1991). In 1992, the Florida legislature modified that requirement, but, in so doing, it inappropriately regulated and discriminated against risk retention groups. Session Law 92-29 requires owner/operators to purchase insurance coverage for claims up to $30,000.00 per incident [1] from an insurance carrier which is a member of the Florida Insurance Guaranty Association ("FIGA").[2]

Petitioner Paratransit Risk Retention Group of Maryland, Inc., ("Paratransit") is a risk retention group as defined by the LRRA. 15 U.S.C. § 3901(4). All other petitioners ("Operator Petitioners") are owner/operators who in 1992 covered at least a portion of their liability risk through Paratransit.

In anticipation of the October 1, 1992 effective date of Session Law 92-29, the State of Florida Department of Highway Safety and Motor Vehicles ("DHSMV") notified the Operator Petitioners that their failure to comply with the financial responsibility requirements of Session Law 92-29 by October 1, 1992 would result in DHSMV's

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[1] Significantly, the new law relieves owners and operators of any obligation to maintain insurance coverage over the $30,000.00 minimum. *See* § 324.031, Fla. Stat. (1992); § 324.021(8), Fla. Stat. (1993).

[2] FIGA is an insurance insolvency guaranty fund. Only insurers licensed to transact insurance in Florida may be members of the fund. § 627.945, Fla. Stat. (1993). Thus, both federal and state law prohibit risk-retention groups from being members of FIGA.

revoking the Operator Petitioners' financial responsibility certificates. This civil action resulted.

B. Procedural History of the Case

1. *Proceedings Before the United States District Court for the Middle District of Florida.*

Petitioners Mears Transportation Group, Inc., Checker Cab Company of Orlando, Inc., City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc., Mears Special Services, Inc., Airport Limousine Service of Orlando, Inc. (the "Mears Group") and Paratransit filed suit on July 29, 1992, against Fred O. Dickinson, III, as Executive Director of DHSMV, and the State of Florida in the United States District Court for the Middle District of Florida, seeking declaratory and injunctive relief for violations of the equal protection provisions of the federal and Florida constitutions and violation of the Liability Risk Retention Act, 15 U.S.C. §§ 3901-06. The Complaint was later amended to add a count for damages for violation of 42 U.S.C. § 1983 against Dickinson in his individual capacity. The State of Florida was dismissed as a party defendant.

Plaintiffs filed a Motion for Preliminary Injunction prohibiting DHSMV from revoking the Mears Group's certificates of financial responsibility on August 19, 1992. On September 22, 1992, after receiving a written response from DHSMV and after hearing oral argument, the Honorable Anne C. Conway, United States District Judge, entered a Preliminary Injunction enjoining DHSMV from enforcing Florida Session Law 92-29 against the Mears Group.

On October 13, 1992, Plaintiffs filed a Motion for Partial Summary Judgment as to Count III of the Complaint, which alleged that Session Law 92-29 violated the

anti-discrimination provision of 15 U.S.C. § 3902(a)(4) to which 15 U.S.C. § 3905(d) was subject and was therefore preempted by the LRRA. That Motion was granted on December 30, 1992.

In the opinion issued with the Order of Partial Final Summary Judgment, the district court analyzed the effect of Session Law 92-29 in light of sections 3902(a)(1), (2) and (4) of the LRRA and found:

> Clearly, Session Law 92-29 at least indirectly regulates the operation of risk retention groups, thereby violating 15 USC § 3902[a](1). It also violates 15 USC § 3902[a](4) for the reason that it otherwise discriminates against a risk retention group. . . . Inasmuch as risk retention groups cannot belong to FIGA, and Session Law 92-29 requires for-hire passenger transportation businesses to use FIGA insurers to satisfy financial responsibility, the Session Law plainly discriminates against risk retention groups.

(App. B, 30a).

The court also analyzed and rejected DHSMV's contention that Session Law 92-29 is not a law "governing the insurance business" as provided in section 3902(b). (App. B, 31a). Finally, the court disposed of DHSMV's argument that sections 3905(a) and (d) permit the state to establish financial responsibility requirements that have the effect of banning all risk retention groups from providing coverage which meets those requirements:

> Defendant's [DHSMV's] reliance on § 3905(d) is also misplaced. At least one court has already rejected virtually the same § 3905(d) argument Defendant makes. The court in *Charter Risk Retention Group Insurance Company v. Rolka,* 796 F. Supp. 154, 158 (M.D. Pa. 1992), stated that such an argument overlooked the first sentence of § 3905(d), which provides that the section is subject to the anti-discrimination provision contained in § 3902 (a)(4). . . .

> The Court approves and adopts the reasoning set forth in *Rolka*. By virtue of the incorporation of the anti-discrimination provision from § 3902(a)(4) into § 3905(d), the latter section does not permit the State of Florida to exclude insurance obtained from risk retention groups in general as a means of satisfying its motor vehicle financial responsibility laws insofar as they relate to owners/operators of for-hire passenger transportation vehicles.

(App. B, 32a-34a).

Thereafter, the parties stipulated to dismiss the remainder of the Amended Complaint without prejudice. DHSMV timely filed a Notice of Appeal of the December 30, 1992 Order. Subsequently, on February 8, 1993, the district court entered a Permanent Injunction enjoining DHSMV from enforcing the provisions of Session Law 92-29. (App. D, 36a-37a). DHSMV appealed that Order as well and sought a Stay of the Permanent Injunction. The Motion for Stay was denied on March 29, 1993.

On February 22, 1993, Ashtin Leasing, Inc., d/b/a Ace Metro Cab and Gator Cab ("Ashtin"), and Paratransit also filed suit against Fred O. Dickinson, III, individually and as Executive Director of DHSMV, in the United States District Court for the Middle District of Florida. That Complaint asserted the same claims that the Mears Group's Amended Complaint had raised. Ashtin filed an Emergency Motion for a Temporary Restraining Order which was granted after oral argument by the Honorable Richard B. Kellam, United States District Judge, on February 24, 1993. After further briefing and argument by the parties, Judge Kellam entered a Preliminary Injunction on March 3, 1993, continuing the Temporary Restraining Order entered February 24, 1993.

Thereafter, the parties stipulated to entry of Partial Final Summary Judgment on Count III, to dismissal of the remaining counts without prejudice and to continu-

ing the terms of the Preliminary Injunction in a Permanent Injunction. Judge Conway entered an Order to that effect on April 29, 1993 (App. F., 40a-41a), thereby placing the Ashtin litigation in a procedural posture paralleling the Mears litigation.

Dickinson took a timely appeal of the stipulated Partial Final Summary Judgment and Dismissal.

2. *Proceedings Before the United States Court of Appeals for the Eleventh Circuit.*[3]

Despite Judge Conway's well-considered opinion which appropriately construed and reconciled sections 3902 (a)(4) and 3905(d), the Eleventh Circuit reversed the district court's ruling. It found Session Law 92-29 to be a state financial responsibility law protected from preemption under section 3905(d), despite its subordinance to section 3902(a)(4). (App. A, 10a). The court predicated this finding on its interpretation of the language of section 3905 which permits states to establish means of proving financial responsibility, which " 'may include or exclude insurance coverage obtained from an admitted insurance company, . . . a risk retention group, or any other source' " (App. A, 11a), reading this language to allow the exclusion of risk retention groups as a class despite section 3902(a)(4).

The Eleventh Circuit discounted Congress's interpolation of section 3902(a)(4)'s anti-discrimination provision into section 3905(d) by stating the record below showed a lack of discriminatory intent and the statute did not single out risk retention groups for preclusion. The court further discounted the same by stating only owners and operators of for-hire passenger vehicles are affected and then only to the extent they would prefer to obtain the initial $30,000.00 in coverage from a risk

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[3] **The Mears appeal and the Ashtin appeal were consolidated before the Eleventh Circuit.**

retention group. Finally, the court concluded that the state exercised its authority to protect the public interest by providing that those injured by the operation of for-hire passenger vehicles would have the added protection of the state insurance insolvency guaranty fund. (App. A, 12a).

REASONS FOR GRANTING THE WRIT

Session Law 92-29 on its face and as applied is exactly the type of state law Congress intended to preempt when it prohibited states' regulation of and discrimination against risk retention groups. Session Law 92-29 expressly and openly discriminates against risk retention groups by prohibiting owners and operators of for-hire passenger vehicles from obtaining the first $30,000.00 of liability coverage from the risk retention groups to which they belong. The Eleventh Circuit failed to give effect to the anti-discrimination limitation Congress imposed on the states' retained authority to establish financial responsibility requirements. Instead, the opinion allows the states to circumvent the LRRA by enacting financial responsibility laws which prohibit specific businesses from joining risk retention groups for the purpose of obtaining liability insurance for a defined level of coverage.

A number of states have adopted similar statutes. This has led to a proliferation of conflicting interpretations of the interrelationship between section 3905(d) and section 3902(a). The Court should grant certiorari to finally and authoritatively resolve the limits of the states' authority to enact financial responsibility laws, especially as some, such as Session Law 92-29, have the effect of precluding risk retention groups *as a class* from offering required types or levels of coverage.

I. SESSION LAW 92-29 IS PRECISELY THE KIND OF LEGISLATION CONGRESS INTENDED THE LIABILITY RISK RETENTION ACT TO PREEMPT.

The legislative history of the LRRA indicates that the Act was passed specifically "to facilitate the formation and operation of risk retention groups." H.R. Rep. No. 865, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5303, 5304 [hereinafter "1986 U.S.C.C.A.N."]. The Act was developed and enacted in response to a recognition that commercial insurance was often prohibitively expensive or unavailable in certain markets:

> [T]he country has been shaken by a crisis in the availability and affordability of commercial liability insurance. Congress has been besieged with complaints regarding huge rate increases, mass cancellations of coverage, and entire lines of insurance virtually unavailable at any price. Crucial activities and services have been hard hit . . . .
>
> * * * *
>
> The Committee believes that these considerations remain valid and justify expansion of the scope of the 1981 Act to include other lines of liability insurance.

Id. at 5304-05. *See also Home Warranty Corp. v. Elliott,* 572 F. Supp. 1059, 1061 (D. Del. 1983) (Congressional intent to encourage risk retention groups is meant to present alternatives in the insurance marketplace which will encourage commercial insurers to establish rates more closely related to risk.).

Moreover, Congress recognized that the purpose of the LRRA could be thwarted if the states retained the power to enact regulations which proscribed or inhibited the operation of risk retention groups in the individual states:

> Some states have created capital and other requirements that make it difficult for risk retention groups

> to form or to operate on a multi-state basis. Many states prevent insurance purchasing groups from achieving the advantages in rates and terms derived from the economic efficiency of collective purchasing that could contribute to resolving affordability and availability problems or they prohibit purchasing groups altogether. *It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above.*

1986 U.S.C.C.A.N. at 5304-06 (emphasis added).

The legislative history strongly underscores the logical conclusion that Congress wanted to afford businesses access to risk retention groups and thus exempted risk retention groups from state regulation which would impede that access. Section 3902 sets forth the specific exemption Congress mandated:

> 3902. Risk Retention Groups
>
> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group . . .[4]
>
> . . . .
>
> (2) require or permit a risk retention group to participate in any insurance insolvency guaranty associ-

[4] Section 3902 identifies some exceptions to the general preemption which are not applicable to the purpose or effect of Session Law 92-29. *See* 15 U.S.C. § 3902(a)(1)(A)-(I).

> ation to which an insurer licensed in the State is required to belong;
>
> . . . .
>
> (4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

15 U.S.C. § 3902 (1986).

Session Law 92-29 is precisely the sort of law which Congress intended to preempt.

A. Florida Session Law 92-29 Violates the LRRA by Prohibiting Owners and Operators of For-Hire Vehicles From Obtaining the Initial $30,000.00 in Liability Coverage From Risk Retention Groups.

Session Law 92-29 amended section 324.031, Florida Statutes, to provide, in pertinent part:

> 324.031 Manner of proving financial responsibility.
>
> The owner or operator of a taxicab, limousine, jitney, or any other for-hire passenger transportation vehicle may prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) or s. 324.151, which policy is issued by an insurance carrier which is a member of the Florida Insurance Guaranty Association.

Both federal and Florida state law prohibit risk retention groups from belonging to FIGA. 15 U.S.C. § 3902(a)(2); § 627.945, Fla. Stat. (1993). By requiring owner/operators to purchase the first $30,000.00 of liability coverage from a member of FIGA, the state has carved out a market from which risk retention groups are excluded. This exclusion amounts to direct discrimination against risk retention groups. Thus, the Florida statute flouts Congress's prohibition of discrimination against risk retention groups.

B. Session Law 92-29 Is Not the Sort of Financial Responsibility Law Congress Exempted From Preemption.

The crux of this litigation is the proper interpretation of 15 U.S.C. § 3905(d), which provides:

> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

The Eleventh Circuit construed the section as exempting from LRRA preemption any "state law aimed at assuring financial responsibility of entities subject to state, county, and city licensure laws." (App. A, 10a). This construction accords too much weight to the exemption and virtually ignores the first clause of the section, which expressly requires the court to view the state statute through the "anti-discrimination" lens of section 3902(a)(4).

Congress specifically recognized the potential for abuse inherent in providing states hostile to risk retention groups with this regulatory loophole:

> Some concern has been expressed to the Committee that the authority of States to apply financial responsibility requirements recognized under this Subsection might be misused by a State hostile to risk retention groups. It is suggested that such a State might impose discriminatory requirements, ex-

> cluding risk retention groups to thwart their operation. *Such use of State authority would be contrary to the intent of the Act.*

1986 U.S.C.C.A.N. at 5316 (emphasis added).

A facial examination of Session Law 92-29 demonstrates that Florida has used its authority to establish financial responsibility requirements in a discriminatory fashion, effectively excluding risk retention groups from Florida's insurance market for owner/operators of for-hire passenger vehicles. The sole governing requirement imposed on the provision of the initial $30,000.00 of liability coverage demanded of owner/operators is that it must be written by a FIGA member. That single requirement thwarts Paratransit's operation in Florida by requiring its members to look to a state-licensed FIGA insurer for the required coverage. The discrimination is as direct and as effective as if the Florida legislature had excluded risk retention groups by name.

Session Law 92-29 violates both the letter and the spirit of 15 U.S.C. § 3902(a)(4).

C. The Eleventh Circuit's Analysis of the Discrimination Prohibited by the LRRA Was Legally Inadequate and Factually Erroneous.

The Eleventh Circuit's analysis of the Congressional limitation of section 3905(d)'s exemption from preemption was both inaccurate and incomplete. The court looked only at what it perceived the intent of the Florida statute to be and ignored the essential element of preemption analysis, "whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). The result of the Eleventh Circuit's cursory analysis was a decision which eviscerated the LRRA.

1. *The Eleventh Circuit failed to accurately define "discrimination" and therefore failed to recognize the facially discriminatory effect of Session Law 92-29.*

The majority opinion limited consideration of the discriminatory effect of Session Law 92-29 to three points of analysis. It did not begin, as law and logic require, with a recognition that discrimination occurs whenever a law fails to treat all equally. *See* Black's Law Dictionary 420 (5th Ed. 1979). A law which unjustifiably singles individuals out for favorable treatment is as discriminatory as one which unjustifiably singles individuals out for exclusion from benefits. In either case, the disfavored experience the injury of discrimination.

The majority opinion avoided that analysis by setting up three "straw-man" arguments to justify its determination that Session Law 92-29 does not violate 15 U.S.C. § 3902(a)(4). The majority panel found a lack of discriminatory *intent* based upon these arguments. As an initial matter, *intent* is not the test under sections 3902(a)(4) and 3905(d); the proper focus is *effect*. Having said this, the three arguments themselves are without merit.

First, the court finds no discrimination because risk retention groups were not singled out by the statute; they are one of many types of insurance carriers which cannot participate in FIGA. This, clearly, begs the issue. The facial effect of Session Law 92-29 was to preserve to insurers licensed in the State of Florida the entire market of owner/operators required to purchase liability coverage for the first $30,000.00 of risk. The law excludes risk retention groups from any possibility of entering that market. Risk retention groups are no less victims of discriminatory treatment because others share in that victimization. Moreover, the LRRA's express prohibition against discrimination does not encompass other non-FIGA insurers, *e.g.*, surplus lines carriers. The court's emphasis

on the broad reach of the exclusion does not negate the fact that the LRRA specifically placed risk retention groups beyond that reach.

The majority went on to find a lack of discriminatory intent in the narrowness of the preclusion. Because only owner/operators were affected, and because they were only affected in their ability to participate in risk retention groups for the first $30,000.00 of coverage, the statute was held not to discriminate. However, section 3902(a)(4) prohibits discrimination outright. It does not permit narrowly tailored discrimination.

Finally, the majority determined that the Session Law was a legitimate and rational exercise of the state's authority. That analysis again begs the question. Section 3902(a)(4) is not needed to bar irrational and illegitimate exercises of state authority. Such laws are by definition unconstitutional. Rather, section 3902(a)(4) conditions the exercise of the states' authority to establish financial responsibility requirements on the additional limitation that such requirements not discriminate against risk retention groups.

2. *The Eleventh Circuit failed to address the discriminatory impact of Session Law 92-29.*

Having applied an inappropriate standard for measuring discrimination, the Eleventh Circuit ended its analysis. Satisfied that the record below and its interpretation of the statute did not indicate specific discriminatory intent, the court never reached the issue of discriminatory impact. It is well-settled, however, that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956).

The Eleventh Circuit did not dispute the fact that Session Law 92-29 precludes risk retention groups from providing the first $30,000.00 of coverage to their members in Florida. The court improperly excused, but did not negate, the discriminatory effect of the statute.

According to the Eleventh Circuit's analysis, unless a state legislature manifests an express discriminatory intent, it may establish facially legitimate financial responsibility requirements which have precisely the discriminatory effect Congress proscribed. The LRRA was intended by Congress to allow risk retention groups to operate nationwide. Therefore, it is inherently illogical to interpret a provision of that Act to allow non-charter states to establish financial responsibility laws which will immediately exclude the class of risk retention groups. Yet this is the practical effect of the Eleventh Circuit's decision.

In rejecting the district court's analysis, the Eleventh Circuit complained that the district court had allowed the first clause of section 3905(d) to swallow the remainder of the provision. (App. A, 13a). The Eleventh Circuit's opinion, however, allows section 3905(d), unrestricted by section 3902(a), to swallow the entire Act.

D. The Correct Interpretation of Section 3905(d) Is That States May Establish Financial Responsibility Requirements Which Do Not Inherently Exclude Risk Retention Groups.

The district court recognized the tension between the limitations of section 3902 and the need for the states to retain authority to establish financial responsibility requirements. The balance of the competing interests, the court held, had been properly reached in *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154 (M.D. Pa. 1992). There, a similar financial responsibility requirement imposed on passenger carrier utilities in Pennsylvania was found to regulate indirectly the operations of all risk retention groups. The Pennsylvania law, like Florida's, compelled members of risk retention groups to obtain insurance from state-licensed carriers. The *Rolka* court also found that section 3905 did not save the Pennsylvania statute from preemption. The court then suggested an appropriate interpretation of section 3905(d):

> [T]his provision means that should a *particular* risk retention group fail to meet conditions of financial responsibility, they may properly be excluded. Any other reading of this provision (such as that states may exclude risk retention groups *in general* as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provisions of the Act.

796 F. Supp. at 159 n.6 (*quoted* at App. B, 33a).

The district court in *Mears* adopted that analysis, and Judge Roney of the Eleventh Circuit, in his dissent, agreed. (App. A, 16a). In short, a state may establish criteria for demonstrating financial responsibility so long as the requirements themselves are not discriminatory. Thus, a state may properly require licensees to obtain coverage from carriers with minimum levels of capital, surplus or reserves. Unlike FIGA membership, which is illegal for risk retention groups, these limits may have the practical effect of excluding certain risk retention groups but will not *ab initio* eliminate a risk retention group's potential participation in a certain liability insurance market.

A state may not establish criteria which a risk retention group is precluded from satisfying merely because it is a risk retention group.

Session Law 92-29 establishes a single criterion for the carriers through which Operator Petitioners may establish financial responsibility—the carrier must be a member of FIGA. Paratransit, the risk retention group to which they all belong, is prohibited from providing financial responsibility coverage *solely by virtue of being a risk retention group*. This is precisely the discriminatory impact Congress intended to prohibit by subjecting section 3905(d) to section 3902(a)(4).

II. THE PROLIFERATION OF INCONSISTENT INTERPRETATIONS OF THE LIABILITY RISK RETENTION ACT DEMONSTRATES THE SIGNIFICANCE OF THIS ISSUE AND THE NEED FOR A FINAL RESOLUTION BY THIS COURT.

The Eleventh Circuit is the first federal appellate court to construe the meaning of the financial responsibility exemption to the LRRA's general preemption. However, the issue has been raised in other federal circuits. *E.g., Rolka,* 796 F. Supp. at 154.

Perhaps the most significant other case currently under review is *Preferred Physicians Mutual Risk Retention Group v. Cuomo,* 865 F. Supp. 1057 (S.D.N.Y. 1994), *appeal filed,* Case No. 94-9224 (2d Cir.)[5] That case involves the construction of New York's Excess Insurance Law.[6] One section of that law provides a mechanism for financing excess coverage for hospital-affiliated physicians who are insured by insurers licensed in New York. Plaintiffs, two risk retention groups serving physicians, challenged the New York statute as discriminating against risk retention groups in violation of the LRRA. The Honorable Peter K. Leisure, United States District Court Judge for the Southern District of New York, agreed with the plaintiffs in that suit and expressly rejected the reasoning of the Eleventh Circuit:

> As plaintiffs assert and State defendants acknowledge, both *Charter* and *Mears Transportation Group, Inc. v. Dickinson, Case* No. 92-632-CIV-Orl-22 (M.D. Fla. Dec. 30, 1992) held that risk retention groups, as a class, cannot be excluded from providing coverage under state automobile financial responsibility statutes. However, during the pendency of the current motion, the Eleventh Circuit overruled the holding of the District Court in *Mears,* and

[5] Oral argument of this appeal is currently scheduled to be heard as early as March 20, 1995.

[6] 1986 N.Y. Laws ch. 266.

> found that Florida could exclude RRGs [risk retention groups], as a class, as financially irresponsible. *Both the dissent in the Eleventh Circuit and this Court disagree with the holding in that case.*
>
> The Eleventh Circuit found that the District Court's opinion was inconsistent with settled principles of statutory construction because the District Court's holding rendered certain sections of the LRRA superfluous. *The opinion of the Eleventh Circuit, however, did not give proper weight to the numerous references contained within the LRRA, including within 3905(d) itself, to the prevention of discrimination nor to the clear purpose, illustrated by abundant documentary support, of the LRRA to foster the spread of RRGs unhampered by individual state regulatory requirements.* Instead, the Eleventh Circuit found that Florida could simply determine that RRGs, as a class, are not financially responsible and therefore owners and operators of for-hire transportation vehicles cannot obtain insurance through them.

865 F. Supp. at 1067 n.4 (emphasis added; citations omitted).

By contrast, the United States District Court for the Eastern District of Kentucky has followed the Eleventh Circuit's lead to uphold a Kentucky statute which requires licensed propane dealers to purchase liability insurance from insurers authorized to do business in Kentucky. *Garage Servs. v. Homes*, 867 F. Supp. 1301 (E.D. Ky. 1994). Although that case dealt with a purchasing group which is subject to a different preemption standard under the LRRA, the court looked to the Eleventh Circuit's analysis of preemption and discrimination to support its ruling.

The pernicious effect of the Eleventh Circuit's faulty and incomplete analysis is not limited to Florida, or to owners and operators of for-hire passenger vehicles, or

even to risk retention groups. The Eleventh Circuit's decision authorizes the states to use a financial responsibility loophole to strangle the life out of the LRRA. Absent a dispositive and authoritative construction of 15 U.S.C. § 3905(d) with section 3902(a)(4) which preserves and enforces the anti-discriminatory, preemptive purpose of the LRRA, risk retention groups will be silently regulated out of practical existence and the Congressional mandate of the LRRA will be rendered meaningless and ineffectual.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 93-2080, 93-2191 and 93-2608

MEARS TRANSPORTATION GROUP, CHECKER CAB COMPANY OF ORLANDO, INC., CITY CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., MEARS SPECIAL SERVICES, INC., AIRPORT LIMOUSINE SERVICE OF ORLANDO, INC., and PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Plaintiffs-Appellees,

v.

STATE OF FLORIDA,

Defendant,

FRED O. DICKINSON, III, as Executive Director of the State of Florida Department of Highway Safety & Motor Vehicles,

Defendant-Appellant.

ASHTIN LEASING, INC., d/b/a ACE METRO CAB, d/b/a GATOR CAB, and PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Plaintiffs-Appellees,

v.

FRED O. DICKINSON, III, as Executive Director of the State of Florida Department of Highway Safety & Motor Vehicles, and individually,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

Oct. 11, 1994

Before BIRCH, Circuit Judge, and RONEY and CLARK, Senior Circuit Judges.

CLARK, Senior Circuit Judge:

Plaintiffs-appellees, for-profit passenger transportation companies and the risk retention group from which they purchase insurance, challenge the validity of Fla.Stat. ch. 324.031, which requires owners and operators of for-hire transportation vehicles to prove financial responsibility by maintaining certain specified insurance coverage. Specifically, plaintiffs-appellees contend that Fla.Stat. ch. 324.031 violates and is preempted by the federal Liability Risk Retention Act, 15 U.S.C. § 3901-3906. On cross-motions for summary judgment, the district court agreed with plaintiffs-appellees and permanently enjoined enforcement of Fla.Stat. ch. 324.031. Because we find that Fla.Stat. ch. 324.031 is precisely the type of state law that Congress expressly excepted from the preemption provisions of the Liability Risk Retention Act, we reverse.

BACKGROUND FACTS

Plaintiffs-appellees Mears Transportation Group, Inc., ("Mears") and Ashtin Leasing, Inc., ("Ashtin") are for-hire passenger transportation companies.[1] Both Mears

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[1] Mears oversees the insurance needs of the remaining for-hire transportation company appellees, which are Checker Cab Company of Orlando, Inc., City Cab Company of Orlando, Inc., Yellow Cab Company of Orlando, Inc., Mears Special Services, Inc., and Airport Limousine Service of Orlando, Inc. Mears R1-11 at ¶2. (The

and Ashtin are members of and purchase insurance from plaintiff-appellee Paratransit Risk Retention Group of Maryland, Inc. ("Paratransit"). Plaintiffs-appellees challenge Fla.Stat. ch. 324.031, which is entitled, "Manner of proving financial responsibility." More specifically, they challenge the Florida legislature's 1992 amendment to this statute, Session Law 92-29. They contend that they are entitled to continue to prove financial responsibility as they did before the 1992 amendment.

Prior to the 1992 amendment, Fla.Stat. ch. 324.031 permitted the operator or owner of any vehicle, including for-hire passenger transportation vehicles, to demonstrate financial responsibility by posting a bond or deposit equal to the number of vehicles owned times $25,000, up to a maximum of $100,000; in addition, the statute required an owner or operator other than a natural person to maintain insurance providing coverage in excess of $25,000 combined single limits to a minimum of $100,000 combined single limits.[2] Thus, section 342.031 [sic] permitted owners of for-hire passenger transportation vehicles, such as Mears and Ashtin, to self-insure the first $25,000 of liability, with the bond or deposit available to insure payment of claims within this $25,000 layer of self-insurance. Mears and Ashtin both complied with section 324.031 by posting a $100,000 certificate of deposit with the State of Florida and by purchasing excess liability coverage from Paratransit. The Paratransit insurance provided coverage for liability in excess of $25,000, for which both Mears and Ashtin were self-insured, up to $500,000 in the case of Mears and $300,000 in the case of Ashtin.[3]

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record citations in this opinion that refer to the record in *Mears Transportation Group, Inc. v. Fred O. Dickinson*, Middle District of Florida Case No. 92-632-CIV-ORL-22, are preceded by "Mears." The record citations that refer to the record in *Ashtin Leasing, Inc. v. Fred O. Dickinson*, Middle District of Florida Case No. 93-133-CIV-ORL-3A22, are preceded by "Ashtin.")

[2] Fla.Stat. ch. 324.031 (1991) (amended 1992).

[3] Mears R1-11 at ¶ 3; Ashtin R1-6 at ¶ 3.

In 1991, Mears operated 502 vehicles;[4] thus, Mears had less than $200 per vehicle on deposit to insure payment of claims within the $25,000 layer of self-insurance. Ashtin, which operated 72 units in 1992,[5] had less than $1400 per vehicle on deposit.

In 1992, the Florida legislature amended section 324.031 with Session Law 92-29. As amended, section 324.031 requires the owners and operators of for-hire passenger transportation vehicles to prove financial responsibility by maintaining insurance covering the first dollar of liability per accident up to $30,000 combined single limits; this insurance must be purchased from "an insurance carrier which is a member of the Florida Insurance Guaranty Association."[6] By so amending section 324.031, the Florida legislature sought to provide persons injured in for-hire passenger transportation vehicles with the protection of the state insurance guaranty fund. Thus, section 324.031 effectively (1) prevents the owners and operators of for-hire passenger transportation vehicles from self-insuring the first $30,000 in liabilities, and (2) precludes those insurance carriers that are not members of the Florida Insurance Guaranty Association ("FIGA") from providing the first $30,000 layer of insurance on for-hire passenger transportation vehicles; this set of non-member insurance carriers includes, among many others,[7]

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[4] Mears R1-11 Attachment.

[5] Ashtin R1-15 Exh. A.

[6] Fla.Stat. ch. 324.031; Fla.Stat. ch. 324.021(7) and (8).

[7] *See* Mears R1-26 at ¶ 4, where a Reinsurance/Financial Specialist with the Florida Department of Insurance attests: "In the State of Florida, there are a number of unauthorized insurance companies, these are (a) surplus line companies; (b) risk retention groups; (c) captive insurers; (d) accessible mutual companies; (e) reciprocals; and (f) commercial self insurance trust funds." *See also* Fla.Stat. ch. 631.52, listing types of insurance the carriers for which are not members of the FIGA.

risk retention groups.[8] Owners and operators of for-hire passenger transportation vehicles may choose to purchase insurance coverage for liabilities in excess of the first $30,000; however, section 324.031 does not require or otherwise regulate such excess insurance coverage.[9]

After the Florida legislature passed Session Law 92-29, the Florida Department of Highway Safety and Motor Vehicles notified both Mears and Ashtin that their financial responsibility certificates would be canceled if they did not comply with Fla.Stat. ch. 324.031 as amended. Shortly thereafter, Paratransit, Mears, and the companies for which Mears oversees insurance needs [10] filed this lawsuit against Fred. O. Dickinson, III, as Executive Director of the State of Florida Department of Highway Safety and Motor Vehicles.[11] Plaintiffs alleged that Fla.Stat. ch. 324.031 as amended was in conflict with the federal Liability Risk Retention Act which exempts risk retention groups from certain state regulations.[12] The parties filed cross-motions for summary judgment on this issue. Relying on a provision in the Liability Risk Retention Act that exempts risk retention groups from state laws that

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[8] 15 U.S.C. § 3902(a)(2) prevents risk retention groups from participating in state insurance guaranty funds.

[9] The counties and municipalities in Florida do require proof of insurance coverage in excess of the $30,000 minimum coverage required by section 324.031. Mears Deposition Exh. 1-Comp, House of Representatives Committee on Insurance Bill Analysis & Economic Impact Statement for HB 1501, at 2.

[10] *See* note 1.

[11] Plaintiffs also named the state of Florida as a defendant, Mears R1-6, but subsequently voluntarily dismissed the state from the action. Mears R1-20.

[12] Plaintiffs also alleged that Fla.Stat. ch. 324.031 as amended violated the state and federal equal protection clause and 42 U.S.C. § 1983. Mears R1-6. After the district court ruled in plaintiffs' favor based on the Liability Risk Retention Act, plaintiffs dismissed these remaining claims without prejudice. Mears R4-81.

"otherwise discriminate against a risk retention group or any of its members," [13] the district court concluded: "Inasmuch as risk retention groups cannot belong to FIGA, and Session Law 92-29 requires for-hire passenger transportation businesses to use FIGA insurers to satisfy financial responsibility, the Session Law plainly discriminates against risk retention groups." [14] Relying on this finding of discrimination, the district court rejected plaintiffs' argument that financial responsibility laws, like Fla.Stat. ch. 324.031, were expressly excepted from the Liability Risk Retention Act's preemption provisions. The district court entered summary judgment in favor of plaintiffs and permanently enjoined defendant from enforcing Fla.Stat. ch. 324.031 as amended against plaintiffs.[15] Dickinson appealed.

Thereafter, Paratransit and Ashtin filed a similar suit against Dickinson. Relying on the district court's decision in the Mears case, Paratransit and Ashtin sought to enjoin Dickinson from enforcing Fla.Stat. ch. 324.031 as amended against Ashtin. Upon joint stipulation of the parties, the district court entered summary judgment in favor of plaintiffs on their Liability Risk Retention Act claim and permanently enjoined Dickinson from enforcing Fla.Stat. ch. 324.031 against plaintiffs.[16] Dickinson appealed. The two appeals, from the district court's decision in the Mears case and from the district court's decision in the Ashtin case, were consolidated by order of this court.

DISCUSSION

The issue before us is whether Fla.Stat. ch. 324.031 as amended, which specifies the manner by which owners and operators of for-hire passenger transportation vehicles

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[13] 15 U.S.C. § 3902(4).

[14] Mears R4-78-4.

[15] Mears R4-87.

[16] Ashtin R1-31.

may prove financial responsibility, is preempted by the federal Liability Risk Retention Act. Because we find that Fla.Stat. ch. 324.031 as amended is precisely the type of state financial responsibility law that Congress expressly excepted from the preemption provisions of the Liability Risk Retention Act, we reverse.

The Liability Risk Retention Act did not always encompass motor vehicle liability insurance. As originally enacted in 1981, the Act was known as the "Product Liability Risk Retention Act of 1981" and was limited to product liability insurance.[17] The 1981 Act addressed the problems businesses were encountering in obtaining affordable product liability coverage. As the legislative history states, the purpose of the Act was to "reduce the problem of the rising cost of product liability insurance by permitting product manufacturers to purchase insurance on a group basis at more favorable rates or to self-insure through insurance cooperatives called 'risk retention groups.'" [18] To accomplish this purpose, Congress specified that the Act would preempt certain state laws that prohibited or hindered the formation of these groups. Specifically, the Act provides:

> (a) [A] risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group [excepting regulation by the State in which the group is chartered and certain specified regulation by non-domiciliary states];

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[17] Product Liability Risk Retention Act of 1981, Pub.L. No. 97-45, 95 Stat. 949 (codified at 15 U.S.C. §§ 3901-3904 (1982) (amended 1986)).

[18] H.R.Rep. No. 190, 97th Cong., 1st Sess. 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1432.

> (2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong; [or]
>
> * * * *
>
> (4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.[19]

In the legislative history, Congress explained that the purpose of these preemption provisions was to facilitate "the efficient operation of risk retention groups by eliminating the need for compliance with numerous nonchartering state statutes that, in the aggregate, would thwart the interstate operation [of] product liability risk retention groups."[20] Congress further explained that "[o]nly state laws which prohibit or state laws of a nonchartering state which attempt to regulate, directly or indirectly, the formation and operation of approved risk retention groups . . . are preempted."[21] In justifying paragraph (2) of these provisions, which exempts risk retention groups from participation in state insurance insolvency guaranty funds, Congress said: "[R]isk retention groups are not full-fledged multi-line insurance companies, but limited operations providing coverage only to member companies, and only for a narrow group of coverages."[22]

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[19] 15 U.S.C. § 3902(a)(1), (2), and (4).

[20] H.R.Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1441.

[21] H.R.Rep. No. 190, 97th Cong., 1st Sess. 6-7 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1435.

[22] H.R.Rep. No. 190, 97th Cong., 1st Sess. 16 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1432, 1445.

In 1986, Congress amended the Act, expanding its scope to cover all types of liability insurance.[23] In so doing, Congress recognized that the operations of risk retention groups would no longer be limited to "narrow groups of coverages" and therefore would have wider application. Accordingly, Congress included in the 1986 amendments provisions to preserve the states' traditional role in regulating insurance and protecting the public. As the legislative history indicates, Congress intended to "augment[] the authority of non-chartering states to regulate solvency, trade practices and other matters" and "contemplated that States may enact statutes and issue regulations to protect the public to the extent such action is not exempt by th[e] Act."[24] First, Congress enacted Section 5, which expanded the scope of permissible non-domiciliary state regulation of risk retention groups.[25] Second, Congress enacted Section 8, which is entitled "Additional Clarification of Permissible State Authority."[26] With Section 8, Congress added to the Act a number of provisions, specifically, §§ 3902(f)-(h), and 3903(g)-(h), and 3905, that preserved certain state authority and excepted certain state regulation from the Act's preemption

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[23] Risk Retention Amendments of 1986, Pub.L. No. 99-563, 100 Stat. 3170 (1986) (codified at 15 U.S.C. §§ 3901-3906 (Supp. IV 1992)).

[24] H.R.Rep. No. 865, 99th Cong., 2d Sess. 7, 18 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5303, 5304, 5315.

[25] Pub.L. No. 99-563, Sec. 5(b)-(e), 100 Stat. 3170, 3172-3173 (codified at 15 U.S.C. § 3902(a)(1)(D)-(I)). In commenting on these permissible non-domiciliary state regulations, this court has said: "In sum, with respect to risk retention groups, Congress carefully crafted a scheme which, on the one hand, provides for broad preemption of a non-domiciliary state's licensing and regulatory laws but which, on the other hand, explicitly preserves for those states several very important powers." *State of Florida, Department of Insuance v. National Amusement Purchasing Group, Inc.*, 905 F.2d 361, 363-64 (11th Cir.1990).

[26] Pub.L. No. 99-563, Sec. 8, 100 Stat. 3170, 3175-3176.

provisions. Pertinent to this appeal is the exception to preemption set out in § 3905(d), which provides:

> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group or any other person.

Thus, Congress specifically excepted from the Act's preemption provisions those state laws aimed at assuring the financial responsibility of entities subject to state, county, and city licensure laws. By so doing, Congress evidenced its intent to preserve for the states the authority to utilize financial responsibility laws to protect the public.

The state law at issue here, Fla.Stat. ch. 324.031, is entitled, "Manner of proving financial responsibility." In 1992, the Florida legislature amended this statute to better protect the public. Under the former statute, Mears and Ashtin carried no insurance for the first $25,000 in liability and had for each vehicle less than $200 and $1400 respectively on deposit to insure payment of claims by injured persons. Under Fla.Stat. ch. 324.031 as amended, persons injured in for-hire passenger transportation vehicles have the protection of insurance and of the state insurance guaranty fund. The amended statute is precisely the type of financial responsibility law that Congress intended, with § 3905(d), to except from the preemption provisions of the Liability Risk Retention Act. Subsection

3905(d) specifically authorizes the state to "specify acceptable means of demonstrating financial responsibility" as a condition for obtaining a license or permit to undertake specified activities. The subsection further provides that "[s]uch means may *include or exclude* insurance coverage obtained from an admitted insurance company, . . . a risk retention group, or any other source. . . ." By amending Fla.Stat. ch. 324.031, the Florida legislature specified an acceptable means for owners and operators of for-hire passenger transportation vehicles to demonstrate financial responsibility; this means *includes* insurance coverage obtained from members of the FIGA and *excludes* the first $30,000 of insurance coverage obtained from non-members, including risk retention groups.[27] Thus, Fla.Stat. ch. 324.031 as amended falls squarely within the language of § 3905(d).

The language of § 3905(d) is qualified by the first clause of the subsection, which reads: "Subject to the provisions of section 3902(a)(4) of this title relating to discrimination. . . ." Subsection 3905(d) is subject to subsection 3902(a)(4), which exempts risk retention groups from state laws that "discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations." It is upon this anti-discrimination provision that the district court rested its holding. The district court concluded that subsection 3905(d) does not except Fla.Stat. ch. 324.031 from the Liability Risk Retention Act's preemption provisions because the state law discriminates against risk retention groups.

There is absolutely nothing in the record before this court to support such a finding of discrimination. Indeed, appellees have not at any time offered any evidence of

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[27] As discussed above, Fla.Stat. ch. 324.031 as amended permits jitney operators to purchase insurance coverage in excess of $30,000 from risk retention groups or any other non-member carriers.

discrimination. Contrary to the district court's conclusion, the record indicates a *lack* of discriminatory intent on the part of the Florida legislature. First, Fla.Stat. ch. 324.031 as amended does not single out risk retention groups for preclusion; risk retention groups are one of many types of insurance carriers that are ineligible for membership in the FIGA.[28] Second, to the extent Fla. Stat. ch. 324.031 precludes insurance obtained from a carrier that is not a member of FIGA, the preclusion is extremely narrow; it applies *only* to the owners and operators of for-hire passenger transportation vehicles and *only* to the first $30,000 in coverage. Finally, the financial responsibility requirements about which appellees complain are a legitimate and rational exercise of the state's traditional authority to act in the public interest; the requirements are designed to provide those members of the public injured in for-hire passenger transportation vehicles with the protection of the state insurance guaranty fund. Thus, the record before this court does not support the district court's conclusion that Fla.Stat. ch. 342.031 [sic] discriminates against risk retention groups.

In the last paragraph of its opinion, the district court concludes: "By virtue of the incorporation of the anti-discrimination provision from § 3902(a)(4) into § 3905 (d), the latter section does not permit the State of Florida to exclude insurance obtained from risk retention groups in general as a means of satisfying its motor vehicle financial responsibility laws insofar as they relate to owners/operators of for-hire passenger transportation vehicles."[29]

This conclusion is inconsistent with settled principles of statutory construction. A court should construe a statute so as to give effect to each of its provisions, "so that no part of it will be inoperative or superfluous, void or insignificant."[30] The opening clause of subsection 3905

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[28] *See* note 7 and text accompanying.

[29] Mears R4-78-7.

[30] *E.g., Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir.1993).

(d) provides that it is subject to the anti-discrimination provisions of subsection 3902(a)(4); subsection 3905(d) goes on to specifically authorize states to enact financial responsibility requirements that "exclude insurance coverage obtained from . . . a risk retention group." To conclude, then, as did the district court, that any state financial responsibility requirement that excludes insurance obtained from risk retention groups "discriminates" against these groups is to render subsection 3905(d) absolutely inoperative; that is, under the district court's interpretation, the opening clause of subsection 3905(d), which qualifies the remainder of the provision, also swallows the remainder of the provision. Certainly, Congress did not enact subsection 3905(d) only to nullify it completely; thus, Congress could not have intended for the anti-discrimination provisions of subsection 3902(a)(4) to render the remainder of 3905(d) inoperative.

The district court attempted to justify its holding by interpreting subsection 3905(d) to mean that states could enact financial responsibility requirements that exclude insurance coverage obtained from a *particular* risk retention group, rather than from risk retention groups in general. Under this interpretation, subsection 3905(d) becomes a means by which states may exclude a particular risk retention group that is in precarious financial condition. The district court's interpretation is erroneous because it would render superfluous several provisions of the Risk Retention Liability Act [sic] that are specifically aimed at preserving state authority to exclude financially impaired risk retention groups. Most notably, subsection 3902(e) and section 3906 specifically authorize a state to obtain injunctive relief to prevent a financially impaired risk retention group from operating in the state.[31] Thus, the district court ignored principles of statutory

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[31] *See also* §§ 3902(a)(1)(E) (authorizing financial examination of risk retention groups) *and* 3902(d)(3) (requiring risk retention groups to submit annual financial statements).

construction and, thereby, misconstrued subsection 3905 (d), which clearly excepts Fla.Stat. ch. 324.031 from the preemption provision of the Risk Retention Liability Act [sic].

The new Florida statute is aimed at protecting the public, not at discriminating against risk retention groups; as such, it is exactly the type of state statute that Congress had in mind when it added subsection 3905(d) to the Risk Retention Liability Act [sic] in 1986. Congress intended to grant to the states the authority to regulate certain businesses affected with the public interest, such as jitney vehicles. Requiring such businesses to carry public liability insurance has been the province of cities, counties, and states for as long as these businesses have existed.

CONCLUSION

For the reasons explained above, the district court's decision is REVERSED and the case is REMANDED for entry of judgment in favor of defendant-appellant Dickinson.

RONEY, Senior Circuit Judge, dissenting:

I respectfully dissent. I would affirm the decision of the district court.

The sole issue in this case is whether Session Law 92-29, a Florida law specifying the manner by which owner/operators of for-hire passenger transportation vehicles may prove financial responsibility is preempted by the Federal Liability Risk Retention Act, 15 U.S.C.A. §§ 3901-3906.

All but one of the plaintiffs are individual for-hire passenger transportation companies that are members of Paratransit Risk Retention Group of Maryland, Inc. ("Paratransit"), which is itself a plaintiff. The district court granted partial summary judgment in favor of plaintiffs against the defendant, Fred O. Dickinson, III, as Executive Director of the State of Florida Department of

Highway Safety & Motor Vehicles (the "State"), and permanently enjoined enforcement of the state law, holding that it violated federal law. The remaining claims were resolved by stipulation of the parties.

In my judgment, the district court's opinion provides a thorough and correct analysis of all but one of the issues raised on appeal. A copy of that opinion is attached to this dissent as an Appendix. I address one issue emphasized by the State on appeal.

On appeal, the State contends that there is no conflict between the federal act and Session Law 92-29 because the state law regulates in an area that risk retention groups do not cover. While the state law's focus is to regulate the initial layer of protection provided by for-hire passenger transportation companies, risk retention groups only write policies covering losses in excess of that initial layer. Paratransit has never written insurance within this mandatory first layer of coverage, and Session Law 92-29 has no effect on the plaintiffs' ability to continue using Paratransit or any other risk retention group for their excess coverage. Basically, the State characterizes the function of the risk retention group as no more than an excess carrier.

Such an argument focuses on only a narrow aspect of how risk retention groups function. A risk retention group is a corporation or other limited liability entity organized for the primary purpose of assuming and spreading all or a portion of the risk of liability exposure among its group members. *See* 15 U.S.C.A. § 3901(a)(4)(A)-(C) (1993); § 627.942(9)(a) and (b), Fla.Stat. (1993). Because each member has similar risks and the members are experienced in administering their own claims, the group can offer affordable coverage for each member's needs. Intrinsic in the group's operation, however, is the ability of each of its members to retain some portion of the risk. The level of "self-insured retention"

retained by each member provides an economic incentive to control risks and administrate claims efficiently and thereby avoid the higher cost of commercial premiums. By requiring the purchase of dollar one coverage, Session Law 92-29 eliminates the members' ability to retain risk and thereby discriminates against risk retention groups and their members. *See* 15 U.S.C.A. § 3905(d) (incorporating the provisions of section 3902(a)(4) relating to discrimination).

The federal law does not preempt the means by which the State can require financial responsibility for self-insurance, but the State cannot effectively eliminate the risk that may be retained by members of risk retention groups. The State must develop ways to strengthen its financial responsibility laws that do not eliminate risk retention group members' ability to be self-insured.

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 92-632-CIV-ORL-22

MEARS TRANSPORTATION GROUP, INC., *et al.*,
Plaintiffs,

v.

FRED O. DICKINSON, III,
Defendant.

Dec. 30, 1992

ORDER

This cause comes before the Court for consideration of Plaintiffs' Motion for Partial Summary Judgment (Dkt. 34), filed October 13, 1992. Therein, Plaintiffs contend that recently-effective Florida Session Law 92-29, which amended § 324.031, Florida Statutes (1992), violates the Liability Risk Retention Act, 15 U.S.C. §§ 3901-3906, and is therefore invalid. After having carefully considered the parties' submissions, the Court agrees and determines that partial summary judgment should be granted in Plaintiffs' favor.

The first six Plaintiffs named in the Amended Complaint are in the for-hire passenger transportation business. As its name suggests, the remaining Plaintiff, Paratransit Risk Retention Group of Maryland, Inc. ("Paratransit"), is a risk retention group. The Defendant is

Fred O. Dickinson, III, the Executive Director of the Florida Department of Highway Safety and Motor Vehicles ("DHSMV").

Florida's motor vehicle financial responsibility laws, contained within Chapter 324, Florida Statutes, require motor vehicle owners and/or operators to provide financial security to recompense others for personal injury or property damage caused by operation of a motor vehicle. Prior to October 1, 1992, § 324.031, Florida Statutes, governing the manner of providing financial responsibility, provided as follows:

> The operator or owner of a vehicle may prove his financial responsibility by:
>
> (1) Furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021 (8) and s. 324.151;
>
> (2) Posting with the [DHSMV] a satisfactory bond of a surety company authorized to do business in this state, conditioned for payment of the amount specified in s. 324.021(7);
>
> (3) Furnishing a certificate of the [DHSMV] showing a deposit of cash or securities in accordance with s. 324.161; or
>
> (4) Furnishing a certificate of self-insurance issued by the [DHSMV] in accordance with s. 324.171.
>
> Notwithstanding the amounts specified in s. 324.021 (7) or s. 324.161, any person, including any firm, partnership, association, corporation, or other person, other than a natural person, electing to use the method of proof specified in subsection (2) or subsection (3) shall post a bond or deposit equal to the number of vehicles owned times $25,000, to a maximum of $100,000; in addition, any such person, other than a natural person, shall maintain insurance providing coverage in excess of limits of $10,000/

> 20,000/5,000 or $25,000 combined single limits, and such excess insurance shall provide minimum limits of $50,000/100,000/25,000 or $100,000 combined single limits.

Before October 1, 1992, Mears complied with the statute by, in part, purchasing insurance coverage through Paratransit. In turn, DHSMV issued a financial responsibility certificate to Plaintiff Mears Transportation Group, Inc. and its affiliates (the other named Plaintiffs).

Florida Session Law 92-29, effective October 1, 1992, created a distinction in the financial responsibility laws between owners/operators of for-hire passenger transportation vehicles and owners/operators of motor vehicles in general. The Session Law, which amended § 324.031, continued to allow owners/operators of other than for-hire passenger transportation vehicles to prove financial responsibility by the four methods set forth in § 324.031 (1)-(4). However, the Session Law changed § 324.031 to provide that

> [t]he owner or opertor of a taxicab, limousine, jitney, or any other for-hire transportation vehicle may prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) or s. 324.151, which policy is issued by an insurance carrier which is a member of the Florida Insurance Guaranty Association.

As amended, § 324.031 thus prohibits owners/operators of for-hire passenger transportaton vehicles from purchasing insurance from risk retention groups to satisfy financial responsibility, inasmuch as risk retention groups are not permitted to join the Florida Insurance Guaranty Association ("FIGA").

Prior to the effective date of Session Law 92-29, a representative of DHSMV wrote a representative of Plaintiff Mears Transportation Group, Inc., stating, in pertinent part, as follows:

> Your financial responsibility certificate will expire November 5, 1992. Based upon a new law effective October 1, 1992, the owner or operator of a taxi, limousine, or other for-hire passenger transportation vehicle will be required to prove their financial responsibility by purchasing an insurance policy through an insurance company which belongs to the Florida Insurance Guaranty Association. Therefore, effective October 1, 1992, this office will have no alternative but to cancel your financial responsibility certificate.

As previously stated, Plaintiffs contend that Session Law 92-29 violates the Liability Risk Retention Act ("LRRA"), 15 U.S.C. §§ 3901-3906. Specifically, Plaintiffs assert that the Session Law violates §§ 3902(a)(1), (2) and (4) of the LRRA. These statutory sections provide as follows:

> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to—[exceptions not pertinent];
> >
> > * * * *
> >
> > (2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;
> >
> > * * * *

> (4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

Clearly, Session Law 92-29 at least indirectly regulates the operation of risk retention groups, thereby violating 15 U.S.C. §§ 3902(a)(1). It also violates 15 U.S.C. §§ 3902(a)(4) for the reason that it otherwise discriminates against a risk retention group. Although Defendant argues that an issue exists concerning whether the Session Law in fact discriminates against risk retention groups, the Court rejects that contention. Inasmuch as risk retention groups cannot belong to FIGA, and Session Law 92-29 requires for-hire passenger transportation businesses to use FIGA insurers to satisfy financial responsibility, the Session Law plainly discriminates against risk retention groups.

Moreover, although § 3902(a)(4) contains an exception for "State laws generally applicable to persons or corporations", the Court determines that the amendment effected by the Session Law 92-29 does not qualify under that exception. Rather than a law of general application, the amendment created by the Session Law is narrowly focused on the manner in which owners/operators of for-hire passenger transportation vehicles may satisfy financial responsibility. To apply § 3902(a)(4) in a contrary manner would only serve to eviscerate the prohibition against discrimination contained in that section.

Defendant also contends that by virtue of two other exceptions contained in the LRRA, Session Law 92-29 does not violate the LRRA. Defendant first relies on 15 U.S.C. § 3902(b). That statutory provision reads as follows:

> (b) Scope of Exemptions
>
> The exemptions specified in subsection (a) of this section apply to *laws governing the insurance business* pertaining to—

(1) liability insurance coverage provided by a risk retention group for—

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of liability insurance coverage for a risk retention group; and

(3) the provision of—

(A) insurance related services;

(B) management, operations, and investment activities; or

(C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance. (Emphasis supplied).

Defendant contends the LRRA exemptions upon which Plaintiffs rely do not apply because Session Law 92-29 is not a law "governing the insurance business", as that phrase is used in the introductory portion of § 3902(b). The Court disagrees. Session Law 92-29 provides that only automobile liability insurance written through a FIGA-member insurer may be used by owners/operators of for-hire passenger transportation vehicles to satisfy financial responsibility. Plainly, it is a law which governs the insurance business.

Defendant also relies on another part of the LRRA, Section 3905, which is entitled "Clarification concerning permissible State authority". That section provides, in pertinent part, as follows:

(a) State motor vehicle no-fault and motor vehicle financial responsibility laws

> Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.
>
> * * * *
>
> (d) State authority to specify acceptable means of establishing financial responsibility
>
> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

Essentially, Defendant contends that §§ 3905(a) and (d) authorize states to exclude insurance provided by *all* risk retention groups as a means of satisfying motor vehicle financial responsibility laws. Again, the Court must reject this contention.

Defendant's reliance on § 3905(a) seems rather half-hearted, and for good reason. Session Law 92-29 does not seek to impose policy form or coverage requirements upon risk retention groups. Rather, it seeks to completely exclude insurance provided by risk retention groups to owners/operators of for-hire passenger transportation vehicles as a means of satisfying the financial responsibility law. Accordingly, § 3905(a) does not apply.

Defendant's reliance on § 3905(d) is also misplaced. At least one court has already rejected virtually the same § 3905(d) argument Defendant makes. The court in *Charter Risk Retention Group Insurance Company v. Rolka,* 796 F.Supp. 154, 158 (M.D.Pa. 1992), stated that such an argument overlooked the first sentence of § 3905(d), which provides that the section is subject to the anti-discrimination provision contained in § 3902(a)(4). Continuing, the court stated:

> To interpret section 3905(d) as defendants insist (thus, granting states unlimited discretion to dictate the means of demonstrating financial responsibility) would render meaningless the anti-discrimination provisions of [the] Act. Rather, the two sections must be read together to properly construe the Act's meaning.

Rolka, 796 F.Supp. at 158. In a footnote, the court concluded that § 3905(d) does not permit a state to exclude risk retention groups in general as a means of satisfying financial responsibility laws. Specifically, the court stated that

> [§ 3905(d)] means that should a *particular* risk retention group fail to meet conditions of financial responsibility, they may be properly excluded. Any other reading of this provision (such as that states may exclude risk retention groups *in general* as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provisions of the Act. (Emphasis in original)

Rolka, 796 F.Supp. at 159, n. 6.

The Court approves and adopts the reasoning set forth in *Rolka.* By virtue of the incorporation of the anti-discrimination provision from § 3902(a)(4) into § 3905(d), the latter section does not permit the State of Florida to exclude insurance obtained from risk retention

groups in general as a means of satisfying its motor vehicle financial responsibility laws insofar as they relate to owners/operators of for-hire passenger transportation vehicles. Moreover, although § 3902(a)(4) contains an exception for "State laws generally applicable to persons or corporations", the Court has previously determined in this Order that Session Law 92-29 is not such a law. Accordingly, that exception does not apply.

Based on the foregoing, it is ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment (Dkt. 34) is GRANTED.

2. The Clerk is directed to enter summary judgment in Plaintiffs' favor on Count III of Plaintiffs' Amended Complaint.

3. Plaintiffs are directed to furnish the Court and Defendant with a proposed permanent injunction within 10 days from the date of this Order.

DONE AND ORDERED in Chambers in Orlando, Florida, this 30th day of December, 1992.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record

APPENDIX B

[Filed Dec. 30, 1992]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 92-632-CIV-ORL-22

MEARS TRANSPORTATION GROUP, INC., *et al.*,
Plaintiffs,

-vs.-

FRED O. DICKINSON, III,
Defendant.

ORDER

This cause comes before the Court for consideration of Plaintiffs' Motion for Partial Summary Judgment (Dkt. 34), filed October 13, 1992. Therein, Plaintiffs contend that recently-effective Florida Session Law 92-29, which amended § 324.031, Florida Statutes (1992), violates the Liability Risk Retention Act, 15 USC §§ 3901-3906, and is therefore invalid. After having carefully considered the parties' submissions, the Court agrees and determines that partial summary judgment should be granted in Plaintiffs' favor.

The first six Plaintiffs named in the Amended Complaint are in the for-hire passenger transportation business. As its name suggests, the remaining Plaintiff, Paratransit Risk Retention Group of Maryland, Inc. ("Paratransit"), is a risk retention group. The Defendant is Fred O. Dickinson, III, the Executive Director of the Florida Department of Highway Safety and Motor Vehicles ("DHSMV").

Florida's motor vehicle financial responsibility laws, contained within Chapter 324, Florida Statutes, require motor vehicle owners and/or operators to provide financial security to recompense others for personal injury or property damage caused by operation of a motor vehicle. Prior to October 1, 1992, § 324.031, Florida Statutes, governing the manner of providing financial responsibility, provided as follows:

> The operator or owner of a vehicle may prove his financial responsibility by:
>
> (1) Furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021 (8) and s. 324.151;
>
> (2) Posting with the [DHSMV] a satisfactory bond of a surety company authorized to do business in this state, conditioned for payment of the amount specified in s. 324.021(7);
>
> (3) Furnishing a certificate of the [DHSMV] showing a deposit of cash or securities in accordance with s. 324.161; or
>
> (4) Furnishing a certificate of self-insurance issued by the [DHSMV] in accordance with s. 324.171.
>
> Notwithstanding the amounts specified in s. 324.021 (7) or s. 324.161, any person, including any firm, partnership, association, corporation, or other person, other than a natural person, electing to use the method of proof specified in subsection (2) or subsection (3) shall post a bond or deposit equal to the number of vehicles owned times $25,000, to a maximum of $100,000; in addition, any such person, other than a natural person, shall maintain insurance providing coverage in excess of limits of $10,000/20,000/5,000 or $25,000 combined single limits, and such excess insurance shall provide minimum limits of $50,000/100,000/25,000 or $100,000 combined single limits.

Before October 1, 1992, Mears complied with the statute by, in part, purchasing insurance coverage through Paratransit. In turn, DHSMV issued a financial responsibility certificate to Plaintiff Mears Transportation Group, Inc. and its affiliates (the other named Plaintiffs).

Florida Session Law 92-29, effective October 1, 1992, created a distinction in the financial responsibility laws between owners/operators of for-hire passenger transportation vehicles and owners/operators of motor vehicles in general. The Session Law, which amended § 324.031, continued to allow owners/operators of other than for-hire passenger transportation vehicles to prove financial responsibility by the four methods set forth in § 324.031(1)-(4). However, the Session Law changed § 324.031 to provide that

> [t]he owner or operator of a taxicab, limousine, jitney, or any other for-hire transportation vehicle may prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) or s. 324.151, which policy is issued by an insurance carrier which is a member of the Florida Insurance Guaranty Association.

As amended, § 324.031 thus prohibits owners/operators of for-hire passenger transportation vehicles from purchasing insurance from risk retention groups to satisfy financial responsibility, inasmuch as risk retention groups are not permitted to join the Florida Insurance Guaranty Association ("FIGA").

Prior to the effective date of Session Law 92-29, a representative of DHSMV wrote a representative of Plaintiff Mears Transportation Group, Inc., stating, in pertinent part, as follows:

> Your financial responsibility certificate will expire November 5, 1992. Based upon a new law effective October 1, 1992, the owner or operator of a taxi,

limousine, or other for-hire passenger transportation vehicle will be required to prove their financial responsibility by purchasing an insurance policy through an insurance company which belongs to the Florida Insurance Guaranty Association. Therefore, effective October 1, 1992, this office will have no alternative but to cancel your financial responsibility certificate.

As previously stated, Plaintiffs contend that Session Law 92-29 violates the Liability Risk Retention Act ("LRRA"), 15 USC § 3901-3906. Specifically, Plaintiffs assert that the Session Law violates §§ 3902(a)(1), (2) and (4) of the LRRA. These statutory sections provide as follows:

> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to—[exceptions not pertinent];
> >
> > * * * *
> >
> > (2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;
> >
> > * * * *
> >
> > (4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

Clearly, Session Law 92-29 at least indirectly regulates the operation of risk retention groups, thereby violating 15 USC § 3902(1). It also violates 15 USC § 3902(4) for the reason that it otherwise discriminates against a risk retention group. Although Defendant argues that an issue exists concerning whether the Session Law in fact discriminates against risk retention groups, the Court rejects that contention. Inasmuch as risk retention groups cannot belong to FIGA, and Session Law 92-29 requires for-hire passenger transportation businesses to use FIGA insurers to satisfy financial responsibility, the Session Law plainly discriminates against risk retention groups.

Moreover, although § 3902(4) contains an exception for "State laws generally applicable to persons or corporations", the Court determines that the amendment effected by the Session Law 92-29 does not qualify under that exception. Rather than a law of general application, the amendment created by the Session Law is narrowly focused on the manner in which owners/operators of for-hire passenger transportation vehicles may satisfy financial responsibility. To apply § 3902(4) in a contrary manner would only serve to eviscerate the prohibition against discrimination contained in that section.

Defendant also contends that by virtue of two other exceptions contained in the LRRA, Session Law 92-29 does not violate the LRRA. Defendant first relies on 15 USC § 3902(b). That statutory provision reads as follows:

> (b) Scope of Exemptions
>
> The exemptions specified in subsection (a) of this section apply to *laws governing the insurance business* pertaining to—
>
> > (1) liability insurance coverage provided by a risk retention group for—
> >
> > > (A) such group; or

(B) any person who is a member of such group;

(2) the sale of liability insurance coverage for a risk retention group; and

(3) the provision of—

(A) insurance related services;

(B) management, operations, and investment activities; or

(C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance. (Emphasis supplied).

Defendant contends the LRRA exemptions upon which Plaintiffs rely do not apply because Session Law 92-29 is not a law "governing the insurance business", as that phrase is used in the introductory portion of § 3902(b). The Court disagrees. Session Law 92-29 provides that only automobile liability insurance written through a FIGA-member insurer may be used by owners/operators of for-hire passenger transportation vehicles to satisfy financial responsibility. Plainly, it is a law which governs the insurance business.

Defendant also relies on another part of the LRRA, Section 3905, which is entitled "Clarification concerning permissible State authority". That section provides, in pertinent part, as follows:

(a) State motor vehicle no-fault and motor vehicle financial responsibility laws

Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group au-

> thorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.
>
> * * * *
>
> (d) State authority to specify acceptable means of establishing financial responsibility.
>
> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

Essentially, Defendant contends that §§ 3905(a) and (d) authorize states to exclude insurance provided by *all* risk retention groups as a means of satisfying motor vehicle financial responsibility laws. Again, the Court must reject this contention.

Defendant's reliance on § 3905(a) seems rather half-hearted, and for good reason. Session Law 92-29 does not seek to impose policy form or coverage requirements upon risk retention groups. Rather, it seeks to completely exclude insurance provided by risk retention groups to owners/operators of for-hire passenger transportation vehicles as a means of satisfying the financial responsibility law. Accordingly, § 3905(a) does not apply.

Defendant's reliance on § 3905(d) is also misplaced. At least one court has already rejected virtually the same

§ 3905(d) argument Defendant makes. The court in *Charter Risk Retention Group Insurance Company v. Rolka,* 796 F.Supp. 154, 158 (M.D. Pa. 1992), stated that such an argument overlooked the first sentence of § 3905(d), which provides that the section is subject to the anti-discrimination provision contained in § 3902(a)(4). Continuing, the court stated:

> To interpret section 3905(d) as defendants insist (thus, granting states unlimited discretion to dictate the means of demonstrating financial responsibility) would render meaningless the anti-discrimination provisions of [the] Act. Rather, the two sections must be read together to properly construe the Act's meaning.

Rolka, 796 F.Supp. 158. In a footnote, the court concluded that § 3905(d) does not permit a state to exclude risk retention groups in general as a means of satisfying financial responsibility laws. Specifically, the court stated that

> [§ 3905(d)] means that should a *particular* risk retention group fail to meet conditions of financial responsibility, they may be properly excluded. Any other reading of this provision (such as that states may exclude risk retention groups *in general* as a means of financial responsibility) would allow states to discriminate against all risk retention groups and their members in violation of the anti-discrimination provisions of the Act. (Emphasis in original).

Rolka, 796 F.Supp. 159, n. 6.

The Court aproves and adopts the reasoning set forth in *Rolka.* By virtue of the incorporation of the anti-discrimination provision from § 3902(a)(4) and § 3905(d), the latter section does not permit the State of Florida to exclude insurance obtained from risk retention groups in general as a means of satisfying its motor vehicle financial responsibility laws insofar as they relate

to owners/operators of for-hire passenger transportation vehicles. Moreover, although § 3902(a)(4) contains an exception for "State laws generally applicable to persons or corporations", the Court has previously determined in this Order that Session Law 92-29 is not such a law. Accordingly, that exception does not apply.

Based on the foregoing, it is ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment (Dkt. 34) is GRANTED.

2. The Clerk is directed to enter summary judgment in Plaintiffs' favor on Count III of Plaintiffs' Amended Complaint.

3. Plaintiffs are directed to furnish the Court and Defendant with a proposed permanent injunction within 10 days from the date of this Order.

DONE AND ORDERED in Chambers in Orlando, Florida, this 30th day of December, 1992.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record

APPENDIX C

[Filed Dec. 30, 1992]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case Number: 92-632-Civ-Orl-22

MEARS TRANSPORTATION GROUP, INC., *et al.*

v.

FRED O. DICKINSON, III

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

A decision having been rendered on plaintiffs' motion for partial summary judgment, summary judgment is entered in plaintiffs' favor and against the defendant on Count III of plaintiffs' amended complaint.

Date 12/30/92

DAVID L. EDWARDS
Clerk

/s/ M. Campbell
(By) Deputy Clerk

c: counsel of record

APPENDIX D

[Filed Feb. 8, 1993]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 92-632-CIV-ORL-22

MEARS TRANSPORTATION GROUP, INC., *et al.*,
Plaintiffs,

-vs-

FRED O. DICKINSON, III,
Defendant.

PERMANENT INJUNCTION

By Order of this Court dated December 30, 1992, Florida Session Law 92-29 was found to violate the preemption provisions of the Liability Risk Retention Act, 15 USC § 3901 *et. seq.* In that Order, this Court specifically determined that the State of Florida may not "exclude insurance obtained from risk retention groups in general as a means of satisfying its motor vehicle financial responsibility laws insofar as they relate to owners/operators of for-hire passenger transportation vehicles."

IT IS, THEREFORE, ORDERED AND DECREED THAT

1. Defendant and his officers, agents, servants, employees, attorneys, and all others acting on his behalf are hereby permanently enjoined from enforcing Florida Session Law 92-29 to prohibit Plaintiffs, Mears Transportation Group, Inc., Checker Cab Company of Orlando, Inc., City Cab Company of Orlando, Inc., Yellow Cab Com-

pany of Orlando, Inc., Mears Special Services, Inc., and Airport Limousine Service of Orlando, Inc., from using insurance obtained from Paratransit Risk Retention Group of Maryland, Inc., or any other risk retention group [as that term is defined in 15 USC § 3901(a)(4)], to satisfy Florida's motor vehicle financial responsibility laws.

2. Within ten (10) days of the date of entry of this Permanent Injunction, Defendant shall renew and reinstate the previously-issued Financial Responsibility Certificate covering Mears Transportation Group, Inc. and its affiliated companies, which was revoked under authority of Session Law 92-29.

DONE AND ORDERED in Chambers in Orlando, Florida, this 8th day of February, 1993.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record

APPENDIX E

[Filed Apr. 29, 1993]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case Number: 93-133-CIV-ORL-22

ASHTIN LEASING, INC. d/b/a ACE METRO CAB AND GATOR CAB; and PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.

v.

FRED O. DICKINSON, III, as Executive Director of the State of Florida Department of Highway Safety and Motor Vehicles, and individually

---

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The isues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Summary Judgment is GRANTED in favor of the Plaintiffs, ASHTIN LEASING, INC. and PARA-TRANSIT RISK RETENTION GROUP OF MARYLAND, INC., and against Defendant, FRED O. DICKINSON, III, on Count III of Plaintiff's Complaint.

Copies to:

Counsel of Record

Date Apr. 29, 1993

DAVID L. EDWARDS
Clerk

/s/ C. Johnston
(By) Deputy Clerk

APPENDIX F

[Filed Apr. 29, 1993]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 93-133-CIV-ORL-22

ASHTIN LEASING, INC. d/b/a ACE METRO CAB AND GATOR CAB; and PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.

Plaintiffs,

-vs-

FRED O. DICKINSON, III, as Executive Director of the State of Florida Department of Highway Safety and Motor Vehicles, and individually,

Defendant.

ORDER

This cause comes before the Court on the parties' Joint Stipulation of Entry of Partial Summary Judgment of Count III, for Entry of Permanent Injunction and for Voluntary Dismissal without Prejudice of Counts I, II & IV (Dkt. 30), filed April 20, 1993.

Based on the stipulation of the parties, it is hereby ORDERED that:

1. Summary judgment is GRANTED in favor of Plaintiffs on Count III of Plaintiff's Complaint.

2. Defendant and his officers, agents, servants, employees, attorneys, and all others acting on his behalf are hereby permanently enjoined from enforcing Florida Ses-

sion Law 92-29 to prohibit Plaintiff Ashtin Leasing, Inc. d/b/a Ace Metro Cab and Gator Cab from using insurance obtained from Plaintiff Paratransit Risk Retention Group of Maryland, Inc. or any other risk retention group (as that term is defined in 15 USC § 3901(a)(4)), to satisfy Florida's motor vehicle financial responsibility laws.

3. Within ten (10) days of the date of entry of this Order, Defendant shall renew and reinstate the previously-issued Financial Responsibility Certificate covering Plaintiff Ashtin Leasing, Inc. d/b/a Ace Metro Cab and Gator Cab, which was revoked under authority of Session Law 92-29.

4. Inasmuch as the remaining counts of Plaintiffs' Complaint have been voluntarily dismissed pursuant to the joint stipulation, this case is DISMISSED.

5. The Clerk of the Court shall enter final judgment in favor of Plaintiffs.

6. The Clerk of the Court is directed to release the registry of the bond of $5,000 posted by Plaintiffs pursuant to Order of the Court (Dkt. 18) to counsel for Plaintiffs.

DONE AND ORDERED in Chambers, Orlando, Florida, this 29th day of April, 1993.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record
Courtroom Deputy

APPENDIX G

[Filed Dec. 20, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2080 & 93-2191

MEARS TRANSPORTATION GROUP, CHECKER CAB COMPANY OF ORLANDO, INC., CITY CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., MEARS SPECIAL SERVICES, INC., AIRPORT LIMOUSINE SERVICE OF ORLANDO, INC., PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Plaintiffs-Appellees,

versus

STATE OF FLORIDA,

Defendant,

FRED O. DICKINSON, III, as Executive Director of the State of Florida Department of Highway Safety & Motor Vehicles,

Defendant-Appellant.

93-2608

ASHTIN LEASING, INC., d/b/a ACE METRO CAB, d/b/a GATOR CAB, PARATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Plaintiffs-Appellees,

versus

FRED O. DICKINSON, III, as Executive Director of the State of Florida Dept. of Highway Safety & Motor Vehicles, and individually,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, and RONEY and CLARK, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch
United States Circuit Judge

APPENDIX H

STATUTORY PROVISIONS

CHAPTER 92-29

Senate Bill No. 1516[*]

A bill to be entitled

An act relating to financial responsibility; amending s. 324.031, F.S.; specifying a method of proving financial responsibility for taxicabs, limousines, and other for-hire passenger transportation vehicles; amending s. 624.4075, F.S., authorizing certain captive insurers to form a domestic insurer with specific surplus requirements; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 324.031, Florida Statutes, is amended to read:

324.031 Manner of proving financial responsibility.—*The owner or operator of a taxicab, limousine, jitney, or any other for-hire passenger transportation vehicle may prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) or s. 324.151, which policy is issued by an insurance carrier which is a member of the Florida Insurance Guaranty Association.* The operator or owner of *any other* [a] vehicle may prove his financial responsibility by:

(1) Furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) and s. 324.151;

(2) Posting with the department a satisfactory bond of a surety company authorized to do business in this

[*] Bracketed materials were deletions in original. Italicized materials were additions in original.

state, conditioned for payment of the amount specified in s. 324.021(7);

(3) Furnishing a certificate of the department showing a deposit of cash or securities in accordance with s. 324.161; or

(4) Furnishing a certificate of self-insurance issued by the department in accordance with s. 324.171.

Notwithstanding the amounts specified in s. 324.021(7) or s. 324.161, any person, including any firm, partnership, association, corporation, or other person, other than a natural person, electing to use the method of proof specified in subsection (2) or subsection (3) shall post a bond or deposit equal to the number of vehicles owned times $25,000, to a maximum of $100,000; in addition, any such person, other than a natural person, shall maintain insurance providing coverage in excess of limits of $10,000/20,000/5,000 or $25,000 combined single limits, and such excess insurance shall provide minimum limits of $50,000/100,000/25,000 or $100,000 combined single limits.

Section 2. Section 624.4075, Florida Statutes, is amended to read:

624.4075 Captive conversion *or expansion* [; application pending on October 1, 1989].

(1) With respect to any attempt by a captive insurer to convert its license to a certificate of authority as a domestic insurer authorized to transact property and casualty insurance whose permit to form a domestic insurer was pending before the department on October 1, 1989, the applicable surplus as to policyholders requirement shall be the greater of $1,500,000 or the amount set forth in s. 624.407(1)(d), rather than the greater of $2,500,000 or the amount set forth in s. 624.407(1)(d).

(2) With respect to the shareholders of any captive insurer in existence on October 1, 1989, desiring to obtain

a certificate of authority as a domestic insurer authorized to transact property and casualty insurance, they shall be permitted to form a domestic insurer with a surplus as to policyholders requirement that is the greater of $1,500,000 or the amount set forth in s. 624.407(1)(d), rather than the greater of $2,500,000 or the amount set forth in s. 624. 407(1)(d).

Section 3. This act shall take effect October 1, 1992.

Became a law without the Governor's approval Mar. 26, 1992.

Filed in Office Secretary of State Mar. 17, 1992.

CHAPTER 324

FINANCIAL RESPONSIBILITY

324.031 Manner of proving financial responsibility.

324.031 Manner of proving financial responsibility. The owner or operator of a taxicab, limousine, jitney, or any other for-hire passenger transportation vehicle may prove financial responsibility by providing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) or s. 324.151, which policy is issued by an insurance carrier which is a member of the Florida Insurance Guaranty Association. The operator or owner of any other vehicle may prove his financial responsibility by:

(1) Furnishing satisfactory evidence of holding a motor vehicle liability policy as defined in s. 324.021(8) and s. 324.151;

(2) Posting with the department a satisfactory bond of a surety company authorized to do business in this state, conditioned for payment of the amount specified in s. 324.021(7);

(3) Furnishing a certificate of the department showing a deposit of cash or securities in accordance with s. 324.161; or

(4) Furnishing a certificate of self-insurance issued by the department in accordance with s. 324.171.

Notwithstanding the amounts specified in s. 324.021(7) or s. 324.161, any person, including any firm, partnership, association, corporation, or other person, other than a natural person, electing to use the method of proof specified in subsection (2) or subsection (3) shall post a bond or deposit equal to the number of vehicles owned times $25,000, to a maximum of $100,000; in addition, any such person, other than a natural person, shall maintain insurance providing coverage in excess of limits of

$10,000/20,000/5,000 or $25,000 combined single limits, and such excess insurance shall provide minimum limits of $50,000/100,000/25,000 or $100,000 combined single limits.

CHAPTER 65

LIABILITY RISK RETENTION ACT

15 U.S.C. § 3902. Risk retention groups

(a) Exemptions from State laws, rules, regulations, or orders

Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—

(1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to—

(A) comply with the unfair claim settlement practices law of the State;

(B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;

(C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;

(D) register with and designate the State insurance commisioner as its agent solely for the purpose of receiving service of legal documents or process;

(E) submit to an examination by the State insurance commissioner in any State in which

the group is doing business to determine the group's financial condition, if—

(i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

(ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(F) comply with a lawful order issued—

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and

(I) provide the following notice, in 10-point type, in any insurance policy issued by such group:

"NOTICE

"This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group."

(2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;

(3) require any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that State; or

(4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

(b) Scope of exemptions

The exemptions specified in subsection (a) of this section apply to laws governing the insurance business pertaining to—

(1) liability insurance coverage provided by a risk retention group for—

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of liability insurance coverage for a risk retention group; and

(3) the provision of—

(A) insurance related services;

(B) management, operations, and investment activities; or

(C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance.

Licensing of agents or brokers for risk retention groups

(c) A State may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(Pub.L. 97-45, § 3, Sept. 25, 1981, 95 Stat. 950.)

(d) Documents for submission to State insurance commissioners

Each risk retention group shall submit—

(1) to the insurance commissioner of the State in which it is chartered—

(A) before it may offer insurance in any State, a plan of operation or a feasibility study which includes the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer; and

(B) revisions of such plan or study if the group intends to offer any additional lines of liability insurance;

(2) to the insurance commissioner of each State in which it intends to do business, before it may offer insurance in such State—

(A) a copy of such plan or study (which shall include the name of the State in which it is chartered and its principal place of business); and

(B) a copy of any revisions to such plan or study, as provided in paragraph (1)(B) (which shall include any change in the designation of the State in which it is chartered); and

(3) to the insurance commissioner of each State in which it is doing business, a copy of the group's annual financial statement submitted to the State in which the group is chartered as an insurance company, which statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by—

(A) a member of the American Academy of Actuaries, or

(B) a qualified loss reserve specialist.

(e) Power of courts to enjoin conduct

Nothing in this section shall be construed to affect the authority of any Federal or State court to enjoin—

(1) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; or

(2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

(f) State powers to enforce State laws

(1) Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2), nothing in this chapter shall be construed to affect the authority of any State to make use of any of its

powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter.

(2) If a State seeks an injunction regarding the conduct described in paragraphs (1) and (2) of subsection (e) of this section, such injunction must be obtained from a Federal or State court of competent jurisdiction.

(g) States' authority to sue

Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

(h) State authority to regulate or prohibit ownership interests in risk retention groups

Nothing in this chapter shall be construed to affect the authority of any State to regulate or prohibit the ownership interest in a risk retention group by an insurance company in that State, other than in the case of ownership interest in a risk retention group whose members are insurance companies.

(As amended Pub.L. 99-563, §§ 5, 7, 8(a), 12(c), Oct. 27, 1986, 100 Stat. 3172, 3175, 3178.)

§ 3905. Clarification concerning permissible State authority.

(a) State motor vehicle no-fault and motor vehicle financial responsibility laws

Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.

(b) Applicability of exemptions

The exemptions provided under this chapter shall apply only to the provision of liability insurance by a risk reten-

tion group or the purchase of liability insurance by a purchasing group, and nothing in this chapter shall be construed to permit the provision or purchase of any other line of insurance by any such group.

(c) Prohibited insurance policy coverage

The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.

(d) State authority to specify acceptable means of establishing financial responsibility

Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities. Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

(Pub.L. 97-45, § 6, as added Pub.L. 99-563, § 8(c), Oct. 27, 1986, 100 Stat. 3175.)

Supreme Court, U.S.
FILED
APR 14 1995
OFFICE OF THE CLERK

No. 94-1542

In the

Supreme Court of the United States

October Term, 1995

MEARS TRANSPORTATION GROUP, INC., CHECKER CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., MEARS SPECIAL SERVICES, INC., AIRPORT LIMOUSINE SERVICE OF ORLANDO, INC., ASHTIN LEASING, INC., D/B/A ACE METRO CAB AND GATOR CAB, AND PATATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Petitioner,

v.

FRED O. DICKINSON, III, AS EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether §3905(d) of the LRRA, entitled "State authority to specify acceptable means of establishing financial responsibility," excepts from preemption Florida's financial responsibility law, which requires owners and operators of commercial passenger transportation companies to obtain "dollar one" coverage for the first layer of liability to demonstrate financial responsibility to operate within Florida.

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No. 94-1542

In the

Supreme Court of the United States

October Term, 1995

MEARS TRANSPORTATION GROUP, INC., CHECKER CAB COMPANY OF ORLANDO, INC., YELLOW CAB COMPANY OF ORLANDO, INC., MEARS SPECIAL SERVICES, INC., AIRPORT LIMOUSINE SERVICE OF ORLANDO, INC., ASHTIN LEASING, INC., D/B/A ACE METRO CAB AND GATOR CAB, AND PATATRANSIT RISK RETENTION GROUP OF MARYLAND, INC.,

Petitioners,

v.

FRED O. DICKINSON, III, AS EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Respondent does not dispute the dates of the filings and orders in this case set forth in Petitioners' jurisdictional statement.

STATEMENT

1. Respondent relies on the facts set out in the Eleventh Circuit's opinion below. *See Mears Transportation Group, Inc. v. Dickinson*, 34 F.3d 1013, 1014-16 (11th Cir. 1994).

REASONS TO DENY THE WRIT

This case does not present "special and important reasons," SUP. CT. R. 10.1, for the exercise of this Court's discretionary certiorari jurisdiction. As shown below, the issues were correctly decided by the lower court and are unlikely to have any substantial impact beyond the immediate parties. First, the decision of the Eleventh Circuit that Florida's financial responsibility law is not preempted by the federal Liability Risk Retention Act[1] (LRRA) rests on the statute and this Court's decisions. This Court has recognized that preemption must be specific. *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132 (1963). In 15 U.S.C. §3905(d), Congress expressly allowed states to prohibit the use of risk retention groups to satisfy state motor vehicle financial responsibility laws. Additionally, there is no proliferation of different interpretations concerning §3905(d). Thus, this case does not represent an issue of nationwide significance that merits this Court's attention.

The petition makes no attempt to show how this case could possibly meet the standards this Court normally applies in determining whether to grant certiorari, but concentrates instead on efforts to persuade the Court that petitioners'

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[1] 15 U.S.C. §3901, et seq.

individual claims of error have merit. That alone is not sufficient to warrant the extraordinary exercise of this Court's certiorari jurisdiction. Accordingly, this case does not warrant the "commitment of scarce judicial resources" that a grant of certiorari represents. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). Therefore, the writ should be denied.

I. FLORIDA'S FINANCIAL RESPONSIBILITY LAW IS PRECISELY THE TYPE OF LEGISLATION CONGRESS INTENDED TO EXCEPT FROM PREEMPTION BY THE LRRA.

A. Florida's financial responsibility law[2] is authorized by §3905(d) of the LRRA.

As amended in 1992, Florida Statute §324.031, entitled "Manner of proving financial responsibility," requires owners and operators of commercial passenger transportation companies to obtain "dollar one" coverage for the mandatory first layer of liability which is $30,000. Dollar one coverage refers to the obligation of an insurer to pay damages from the first dollar of liability to the limits of the coverage, including amounts encompassed by a deductible, in the event the insured is unable to meet this obligation. In doing so, §324.031 prohibits owners and operators of commercial passenger transportation companies from self insuring the first layer of mandatory liability insurance.

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[2] Florida Statute §324.031 (amended in 1992 by Session Law 92-29).

Prior to the 1992 amendment to §324.031, contained in Session Law 92-29, the commercial passenger transportation petitioners demonstrated their financial responsibility under state law by self insuring the first layer of liability, posting a $100,000 certificate of deposit with Florida's Department of Highway Safety and Motor Vehicles, and purchasing excess coverage from petitioner, Paratransit Risk Retention Group. Session Law 92-29 prohibited petitioners from self insuring the first layer of liability insurance for purposes of demonstrating financial responsibility, and therefore required petitioners to purchase "dollar one" insurance coverage for the first layer of mandatory liability coverage from a member of the Florida Insurance Guaranty Association (FIGA).[3] Although the commercial passenger transportation petitioners were prohibited from self insuring the first layer of liability, they were not prohibited from purchasing the excess insurance they had always purchased from petitioner Paratransit Risk Retention Group, and they continue to do so.[4]

Under the LRRA, businesses with similar types of risks may form and own their own insurance company to insure against liability exposures. 15 U.S.C. §3901(a)(4). Risk retention groups are self-insurance mechanisms in

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[3] The Florida Insurance Guaranty Association (FIGA) is established and governed by Part II, Chapter 631, Florida Statutes, to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies . . . to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." §631.51(1), Fla. Stat. (1991).

[4] Petitioners continue to demonstrate financial responsibility under the old statutory scheme until this issue is resolved by this Court. *Mears, et al. v. Dickinson*, Nos. 93-2080, 93-2191 & 93-2608 (11th Cir. Feb. 15, 1995) (order granting stay of final mandate).

which the members self insure the first layer of liability and then purchase excess insurance from the group. Risk retention groups were first created to address the liability insurance crisis in the products liability area.[5] *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986) (for a thorough review of the legislative history of the Product Liability Risk Retention Act). Later in 1986, Congress extended risk retention groups to other areas of insurance coverage.[6] H.R. Rep. No. 865, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5303, 5305. As the Eleventh Circuit noted in its opinion below,

> [i]n so doing Congress recognized that the operation of risk retention groups would no longer be limited to "narrow groups of coverages" and therefore, would have wider application. Accordingly *Congress included in the 1986 amendments provisions to preserve the states' traditional role in regulating insurance and protecting the public*. As the legislative history indicates, Congress intended to "augment[] the authority of non-chartering states to regulate solvency, trade practices and other matters" and *"contemplated that States may enact statutes and issue regulations to protect the public to*

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[5] Product Liability Risk Retention Act of 1981, Pub.L. 97-45, 95 Stat. 949 (1982) (codified at 15 U.S.C. §§3901-3904(amended 1986)).

[6] Risk Retention Amendments of 1986, Pub.L. 99-563, 100 Stat. 3170 (1986) (codified at 15 U.S.C. §§3901-3906 (Supp. IV 1992)).

> *the extent such action is not exempt by th[e] Act."*

Mears, 34 F.3d 1017 (emphasis added) (footnotes omitted).

Specifically, Congress enacted §3905(d), entitled "State authority to specify acceptable means of establishing financial responsibility," which provides

> Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, ***nothing in this chapter shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility*** where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specific activities. ***Such means may*** include or ***exclude insurance coverage obtained from*** an admitted insurance company, an excess lines company, ***a risk retention group***, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group or any other person.

15 U.S.C. §3905(d) (emphasis added). Thus, §3905(d) expressly allows states to exclude insurance coverage obtained from risk retention groups for purpose of demonstrating financial responsibility. As the Eleventh Circuit correctly noted

> By amending [Florida's financial responsibility law through Session Law 92-29], the Florida legislature specified an acceptable means for owners and operators of for-hire passenger transportation vehicles to demonstrate financial responsibility; this means *includes* insurance coverage obtained from members of the FIGA and *excludes* the first $30,000 of insurance coverage obtained from non-members including risk retention groups. Thus, [Florida's financial responsibility law] as amended falls squarely within the language of §3905(d).

Mears, 34 F.3d at 1018 (emphasis in original) (footnotes omitted).

B. The Eleventh Circuit's decision is correct and does not merit this Court's review.

Petitioners claim that the Eleventh Circuit's analysis is factually and legally erroneous. Specifically, petitioners claim that the court erred because it did not define "discrimination" and because it did not address the alleged discriminatory impact of Florida's financial responsibility law.

Contrary to petitioners' assertion, the Eleventh Circuit fully addressed the anti-discrimination provision of the LRRA, contained in §3902(a)(4), which exempts risk retention groups from "state laws that discriminate against a risk retention group or any of its members." *Mears*, 34 F.3d at 1018. First, the court held that because Florida's

financial responsibility law prohibits commercial passenger transportation companies from self insuring with **any** self insurance scheme, the law does not single out risk retention groups. *Id.* Second, the court concluded that the extent to which the law precludes coverage obtained by a non-FIGA member, a class including but not limited to risk retention groups, is extremely narrow because it only applies to owners and operators of commercial passenger transportation vehicles and it only applies to the first layer of liability. *Id.* Lastly, the court held that Florida's financial responsibility law is a legitimate and rational exercise of the state's traditional authority to act in the public's best interest by providing citizens injured in commercial passenger transportation vehicles the protection of the state insurance guaranty fund. *Id.*

In short, the Eleventh Circuit applied the well-established rational basis test for "discrimination" used in evaluating economic regulations[7] and found no discrimination in this case. *See F.C.C. v. Beach Communications*, Inc., 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993); and *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). As the Eleventh Circuit's analysis makes clear a law does not impermissibly "discriminate" under this standard so long as any difference in treatment "rationally furthers a legitimate state interest." Florida's financial responsibility law does not treat risk retention groups differently than other self-insurance schemes, it impacts all non-FIGA members not just risk

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[7] The LRRA does not itself define "discrimination," thus, the Eleventh Circuit's use of undisputed case law principles was correct.

retention groups, and it rationally furthers a legitimate state interest.

Petitioners next argue that the court did not address discriminatory impact.[8] The appellate court, however, did hold that there was "absolutely nothing in the record before [it] to support a finding of discrimination" and further that "[petitioners] have not at any time offered any evidence of discrimination. *Mears*, 34 F.3d at 1018.[9] Because the Eleventh Circuit's review of the record revealed absolutely no evidence of discrimination, the court had no reason to address discriminatory impact.

After this review the court analyzed the language of §§3905(d) and 3902(a)(4), giving each provision its full force and effect. In doing so, the Eleventh Circuit found that to interpret §3905(d) as Mears and Ashtin sought would render superfluous several other provisions of the LRRA specifically aimed at preserving state authority to exclude financially impaired risk retention groups. *Id.* at 1019. Thus, the court concluded that Florida's financial responsibility law is precisely the type of law Congress intended to except from preemption because it is squarely within the plain language of §3905(d).

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[8] Petitioners' argument regarding discriminatory impact also appears to be an impermissible attempt to resurrect their equal protection challenge to Florida's financial responsibility law which they dismissed without prejudice in the district court. Petition, p. 7.

[9] Because this was an appeal from the district court's grant of a motion for summary judgment, the court reviewed the record *de novo*. *U.S. v. Dakovich*, 11 F.3d 140, 141 (11th Cir. 1994) (citing *U.S. v. Wilson*, 894 F.2d 1245, 1254 (11th Cir.), *cert. denied*, 497 U.S. 1029 (1990)).

Contrary to the plain language of the statute, Petitioners argue that the correct interpretation of §3905(d) is that states' express statutory right to establish financial responsibility requirements is limited in that . . . a state may not "exclude insurance coverage obtained from a risk retention group." Petition, pp. 17-8. Petitioners' contrived interpretation of §3905(d) flies in the face of the plain language of that section which specifically authorizes states to establish means of demonstrating financial responsibility, and expressly allows states to exclude insurance obtained from risk retention groups for this purpose.[10]

The Eleventh Circuit was correct when it held that §3905(d) means what it says; that "nothing in [the LRRA] shall be construed to preempt the authority of a state to specify acceptable means of demonstrating financial responsibility" and that "such means may exclude insurance coverage obtained from . . . risk retention groups." *See Id.* at 1018; and 15 U.S.C. 3905(d). Accordingly, the Eleventh Circuit's decision does not merit this Court's review.

II. THERE IS NO "PROLIFERATION OF INCONSISTENT INTERPRETATIONS" REGARDING §3905(D) TO MERIT THIS COURT'S REVIEW.

The Eleventh Circuit's decision in *Mears* is undisputedly the first appellate decision on the merits to interpret §3905(d) of the LRRA. Petitioners claim that a

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[10] Petitioners rely on *Charter Risk Retention Group Ins. Co. v. Rolka*, 796 F. Supp. 154 (M.D. Pa. 1992), a memorandum opinion on a motion to dismiss, for this proposition. This case is of doubtful weight; it was settled before any decision on the merits was reached.

"proliferation of inconsistent interpretations" regarding §3905(d) exists to establish certiorari jurisdiction. To support this claim petitioners cite two district court cases. First, petitioners cite *Preferred Physicians Mutual Risk Retention Group v. Cuomo*, 865 F.Supp. 1057 (S.D.N.Y. 1994), currently on appeal before the Second Circuit. *Preferred Physicians* is factually distinguishable from the instant case. *Preferred Physicians* deals with New York's Excess Insurance Law[11] which offers free excess insurance to hospital-affiliated physicians who purchase medical malpractice insurance from New York insurers. In that case, the district court and both parties agreed that New York's Excess Insurance Law is **not** a financial responsibility law. *See Id.* at 1067 n.4. Therefore, New York's Excess Insurance Law does not fall squarely within -- or even near -- the language of §3905(d).

The district court further noted that *Preferred Physicians* differed from this case in that the intent of Florida's financial responsibility law at issue was to safeguard passengers in commercial passenger transportation vehicles by assuring access to the state's insurance guaranty fund. Thus, owners and operators of commercial passenger transportation vehicles were required to receive a certain amount of initial primary insurance from Florida insurers, but could then receive additional insurance from risk retention groups without restraint -- as the commercial passenger transportation company petitioners have done in this case. *Id.* The district court then noted that New York's Excess Insurance Law has exactly the opposite effect because it provides free additional excess insurance to physicians who

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[11] 1986 N.Y. Laws ch. 266, §18.

receive primary insurance coverage from New York licensed insurers and nothing to those who receive primary coverage through risk retention groups. The *Preferred Physicians* court concluded that New York's Excess Insurance law cannot "rationally further" the state interest of protecting physicians and their patients from irresponsible insurers because physicians are permitted to continue to obtain primary coverage from risk retention groups. *Id.* Because *Preferred Physicians* is factually distinguishable and presents a different issue from this case, it does not create a conflict worthy of certiorari jurisdiction.

To support their claim that this issue is one of national importance, petitioners also cite *Garage Services v. Homes*, 867 F.Supp. 1301 (E.D. Ky. 1994). As petitioners concede, however, *Garage Services* is not on point: it dealt with purchasing groups, which have a different preemption standard set out in the LRRA than risk retention groups. Purchasing groups are covered by specific partial preemptions, whereas, risk retention groups are covered by a general preemption with specific exceptions. *See Florida Dept. of Insurance v. National Amusement Purchasing Group, Inc.*, 905 F.2d 1361, 1363 (11th Cir. 1990); and *Insurance Co. of State of Pennsylvania v. Corcoran*, 850 F.2d 88, 91 (2d Cir. 1988) (comparing §§3902(a)(1) and 3903(a) of the LRRA). Because *Garage Services* deals with purchasing groups, not risk retention groups, it's relevance to the issue in the instant case is questionable.

The fact that the LRRA was enacted in 1986 and petitioners can cite only **two district** court cases, **neither of which interpret §3905(d)**, demonstrates that this case does

not merit this Court's attention. Accordingly, the petition should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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